UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

CRAFTS CABINET,
A DIVISION OF POZZI/HILL, INC.

and Case 31–CA–26404

CABINET MAKERS, MILLMEN AND INDUSTRIAL CARPENTERS, LOCAL 721, affiliated with UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

Michelle Youtz Scannell, Los Angeles, Calif., for the General Counsel.
James P. Caiopoulos, Huntington Beach, Calif., for Respondent.
Gerald V. Selvo and *Daniel Shanley*, of *DeCarlo, Connor & Selvo*, Los Angeles, Calif., for the Charging Party.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case has been submitted to the Division of Judges upon a joint motion of the parties who seek a decision based upon a hearing waiver and formal stipulation of facts signed by the parties on June 16, 17 and 21, 2004. This submission was accompanied by two position statements. Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America (the Union), filed the underlying unfair labor practice charge on August 1, 2003. The Regional Director for Region 31 issued the initial complaint on November 19, 2003; it was subsequently amended on March 23, 2004. The amended complaint alleges that Crafts Cabinet, a Division of Pozzi/Hill, Inc., (Respondent) violated §8(a)(5) and (1) of the Act by unilaterally changing the bargaining unit's health benefits and insurance provider.

Pursuant to an order issued by the Associate Chief Administrative Law Judge, the General Counsel and Respondent have timely filed briefs in support of their respective positions. [1] They have been carefully considered. Based upon the pleadings and the stipulation of facts, I hereby make the following findings.

[1] The Union has filed a letter joining the General Counsel's brief.

Jurisdiction

Based on the stipulation, Respondent Pozzi/Hill, Inc., is a California corporation which manufactures cabinets at its facility in Chatsworth, California. During its last fiscal year, a representative period, in the course of its business operations Respondent purchased and received at its Chatsworth operation goods and materials valued in excess of $50,000 from enterprises in California, which in turn, had directly received them from firms located outside California. In addition, its gross revenues during the past calendar year, exceeded $500,000. As a result, Respondent at all material times, has been an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. Furthermore, the stipulation recites that the Union is a labor organization within the meaning of §2(5) of the Act.

The Operative Facts

Since at least 1975, the Union has represented a bargaining unit of manufacturing employees at the Chatsworth plant. On May 1, 2000, Respondent Pozzi/Hill acquired the plant from its previous owner, Crafts Cabinet, Inc. Atlas Holdings and Randall Pozzi own Respondent.

At the time of the purchase, the employees' wages, hours and terms and conditions of employment were governed by a collective bargaining agreement (the 1998 agreement) [2] between Crafts Cabinet and the Union. The 1998 agreement was not scheduled to expire until July 31, 2003. On August 1, 2000, shortly after the purchase, Respondent and the Union executed a memorandum of understanding in which the parties agreed that the 1998 agreement would remain in full force and effect until its expiration on July 31, 2003. Accordingly, since August 2000 and continuing to date, the Union has been the exclusive collective bargaining representative, defined by §9(a) of the Act, of Respondent's bargaining unit employees. Under the 1998 agreement (p. 9, Section 15), Respondent was bound to the health and welfare plan known as the Southern California Lumber Industry and Trust Welfare Fund.

The stipulation provides that "On or before March 31, 2003, the health insurance for the bargaining unit was canceled by the provider due to Respondent's non-payment of the insurance premiums." It further states "Because of Respondent's non-payment of the insurance premiums, the bargaining unit employees were not insured from March 31, 2003 to August 1, 2003."

On August 1, 2003, Respondent acquired new a new health insurance provider and connected health benefits, apparently through an entity other than the Southern California Lumber Industry and Trust Welfare Fund. This change was accomplished without first bargaining with the Union.

The stipulation of facts concludes "During the month of July 2003, Respondent conducted two employee meetings, lasting about 45 minutes each, to notify the employees that their (then) present health coverage had been canceled." It also informed them that it would seek new health coverage for its employees, but that in the interim, "it would be responsible for any out-of-pocket medical expenses incurred by" them.

Legal Issues

The stipulation ends by stating the issue to be decided: "Whether the Respondent's August 1, 2003 change to the bargaining unit's health insurance, without prior notification or bargaining with the Union, violates §8(a)(1) and (5) of the National Labor Relations Act, as amended."

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[2] The bargaining unit description is detailed in the stipulation of facts. It is unnecessary to repeat it here.

It should be observed at this juncture that the stipulated issue statement resolves a latent remedy ambiguity which might have been extrapolated from the amended complaint. In addition to seeking a remedy for the alleged unilateral change in health insurance carriers, the complaint might also be seen as seeking a remedy for the nonpayment of premiums to the Southern California Lumber Industry and Trust Welfare Fund. However, the statement of issues renders that question moot. Reimbursement of the previous plan is not being sought. [3]

In addition, two position statements accompany the pleadings and factual stipulation. One is signed by counsel for the General Counsel; the other by counsel for Respondent. Although Respondent's position statement makes several assertions of fact, I have given it no weight as position statements are not agreed-upon facts. In any event the material counsel cites does not have any bearing on resolving the legal issue which the parties have presented.

I therefore proceed to the legal analysis.

Any discussion of unilateral changes must begin with acknowledging the Supreme Court's language in *NLRB v. Katz*, 369 U.S. 736 (1962). Specifically, the Court was faced with the question of whether the employer's unilateral changes of certain working conditions was in contravention of the mandate to bargain in good faith as set forth in §8(d) of the Act. In pertinent part that section states:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party. . . .

In *Katz* the Court held that a party who made unilateral changes in wages, hours and terms and conditions of employment was engaging in conduct that was tantamount to refusing to bargain at all. Justice Brennan, speaking for the Court, said, Id., at 743-744:

> The duty "to bargain collectively" enjoined by 8(a)(5) is defined by 8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact - "to meet . . . and confer" - about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within 8(d), and about which the union seeks to negotiate, violates 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5) much as does a flat refusal. [Footnotes omitted]

[3] The stipulation, apparently by design, does not suggest that the Fund needs the benefit of a Board restitution order. Certainly the Fund is not a party here and it is, no doubt, perfectly capable of protecting itself. Moreover, the General Counsel has not argued for such a remedy, though in a proper fact pattern, one might be fashioned. See, for example, *Stone Boat Yard*, 264 NLRB 981, 982 (1982), enfd. 715 F.2d 441 (9th Cir. 1983), cert. den. 446 U.S. 937 (1984).

Health insurance is clearly a mandatory bargaining subject as defined by §8(d). *United Hospital Medical Center*, 317 NLRB 1279, 1281-83 (1995); *Stone Boat Yard*, supra; *Hen House Market No. 3*, 175 NLRB 596 (1969), enfd. 428 F.2d 133 (8th Cir. 1970) (unilateral change in contractually required health plan after expiration of collective bargaining contract violates §8(a)(5)). Therefore, changing the health plan without first giving the §9(a) representative a meaningful opportunity to bargain over the change is a straightforward violation of §8(a)(5) and good faith cannot, by definition, be a defense. See *Brannan Sand & Gravel*, 314 NLRB 282 (1994). Certain affirmative defenses, however, have been recognized. These include waiver, exigent circumstances and union obstructive conduct. None has been properly invoked here, although Respondent mentions exigent circumstances in its position statement and makes the argument in its brief.

I will nonetheless treat with it, principally to point out the argument's deficiencies.

Paragraph 8 of the stipulation recites: "On or before March 31, 2003, the health insurance plan . . . was canceled by the provider due to Respondent's nonpayment of the insurance premiums." That fact leads to the inescapable conclusion that it was Respondent itself which caused the loss of health insurance coverage, not some unforeseen emergency, such as the collapse of the insurer. In addition to the usual payment obligations imposed by any collective bargaining contract, the Act requires an employer to pay those obligations even when the employer is unable to do so. See *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063 (1974). A failure to do so will be deemed an unlawful unilateral change under §8(a)(5). [4] Therefore, in making the argument that loss of health coverage is an emergency warranting the right to

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[4] In *Oak Cliff-Golman*, the employer faced what the Board accepted as a 'dire financial crisis.' Here is what the Board said:

> In October 1971, Respondent's business faced a dire financial crisis. Respondent decided that, rather than close its operations and lose good employees, it would attempt to remain in operation by reducing the wages and salaries of all its employees. It informed the Union of its financial plight and of its wage reduction decision at meetings held October 5 and 8, and asked for the Union's "blessings." The Union refused to agree to the wage cuts primarily because it did not wish to open the contract's provisions with respect to other employees in the multiemployer unit. Respondent nonetheless implemented its decision and, commencing with the payroll of October 14, began paying its employees both in the unit and outside of it at reduced rates of pay.
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> * * *
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> Turning to the merits, Respondent alleges there is no room in the facts for any finding that its conduct violated the "good-faith" bargaining standards imposed upon it by the Act. It urges, in this respect, that its sole motive and intent in reducing wages was to meet an economic crisis; that its action in fact had the salutary effect of preserving for employees jobs they would otherwise have lost; and that it advised the Union fully of all the reasons for its action and of the financial facts supporting it. We have no doubt that Respondent's description of its motive and its object is a truthful one. But we have here a situation where these considerations are irrelevant. The unambiguous language of Section 8(d) of the Act explicitly: (1) forbade Respondent's midterm modification of the contract's wage provisions without the Union's consent; and (2) granted the Union the privilege it exercised to refuse to grant consent. Nowhere in the statutory terms is any authority granted to us to excuse the commission of the proscribed action because of a showing either that such action was compelled by economic need or that it may have served what may appear to us to be a desirable economic objective. To borrow the words of the Supreme Court, what must here be recognized is that "[t]he law is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts [and of the Board] cannot be set up against it in the supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results." *Standard Sanitary Mfg. Co. v. U.S.*, 226 U.S. 2049. From all this, it follows that Respondent's unilateral modification of the wage provisions of its contract violated Section 8(a)(5) and (1) of the Act as alleged. (Footnote omitted.)

unilaterally choose a new plan, Respondent is relying on its own failure, not only to pay under its contract obligation, but also to abide by the law requiring it to pay. There is no circumstance where a defaulting employer can take advantage of his own failure to pay to excuse his failure to bargain with the Union over the new plan.

Respondent is no doubt correct. The employees needed health insurance and needed it quickly. Yet, that predicament was one for which Respondent was entirely responsible. It could have avoided the situation altogether simply by paying the premiums as it had contractually obligated itself to do. Its failure to do so was the sole reason the health plan was lost. And, it is true that the Union likely would have been difficult to cope with in trying to resolve the problem for the Union certainly has a strong interest in maintaining the standards it has negotiated. Even so, Respondent could not, without violating its §8(d) obligation, simply ignore the Union while trying to find replacement insurance. Respondent needed to bargain with the Union over the change in health insurance carriers. Certainly its failure to pay did not excuse it from the obligation to do so. Accordingly, I am unable to give the contention any significant consideration.

In any event, the stipulation simply does not set forth any facts upon which such an argument can be grounded. Nowhere does it state that Respondent's default was due to anything other than what would be normally expected — a business reverse. If it were otherwise, the parties would no doubt have agreed to such a truth. Respondent has really offered no sustainable defense.

I therefore find that Respondent's unilateral decision to purchase replacement health insurance was a violation of §8(a)(5) and (1) of the Act.

As noted above, paragraph 11 of the stipulation stated that in July 2003, Respondent had met with its employees advising them of the loss of health coverage and accepting responsibility to cover out-of-pocket health expenses which they might incur. The stipulation did not go on to say that there had been such expenses and that Respondent had paid them. In a sense, therefore, it is unclear whether Respondent carried out its promise. Even so, the General Counsel has not sought a make-whole remedy for that period of time. I presume that is because it is satisfied that the promise was kept.

In addition, paragraph 11 might be read as a predicate for a finding that the July 2003 meetings were a separate §8(a)(5) violation — one of direct dealing. I decline that opportunity because the complaint does not include such an allegation. Even if it did, the Board has held that informing the employees of a unilateral change is not the same as directly bargaining with them over the change. *Johnson's Industrial Caterers*, 197 NLRB 352 (1972); *Huttig Sash and Door Company, Incorporated*, 154 NLRB 811, 817 (1965). Accordingly, I shall not find an unfair labor practice based upon that paragraph. It does, however, explain why the remedy may be truncated.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action will include an order to post a notice to employees advising them of the remedial steps it will take. I recognize that in unlawful unilateral change cases it is the Board's normal practice to order rescission of the change in order to put the parties in a position of status quo ante and to make the employees whole for any loss they may have suffered as a result of the unilateral change. As explained above, due to the stipulation of facts, I cannot make findings or recommendations concerning expenses the employees may have suffered by the loss of health insurance. As for the possible rescission of the choice of health insurance carriers, there must be a departure from the normal order. The General Counsel has not asked for rescission and that is no doubt due to the fact that canceling

the health insurance would put the employees in a worse position than they are now with the unlawfully impressed plan. Therefore, I shall recommend a conditional order, one which will give the Union the option of demanding that the new plan be rescinded. See *Herman Sausage Co., Inc.*, 122 NLRB 168 (1958); *Great Western Broadcasting Corp.*, 139 NLRB 93, 96 (1962); *Bellingham Frozen Foods*, 237 NLRB 1450 (1978) (order language at 1469). Respondent will also be ordered to bargain in good faith with the Union concerning health insurance if the Union wishes to do so.

Based on the foregoing findings of fact and the entire record in this case, I hereby make the following

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of § 2(2), (6) and (7) of the Act.

2. Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America. is a labor organization within the meaning of § 2(5) of the Act.

3. The Union is, and has been at all times material to this case, the §9(a) exclusive collective bargaining representative of the employees set forth in the stipulation of fact.

4. When, on or about August 1, 2003, Respondent unilaterally imposed a new health plan and provider upon its bargaining unit employees without giving the Union the opportunity to bargain it violated §8(a)(5) and (1) of the Act.

Based on the foregoing findings of fact and conclusions of law and the stipulated record, I issue the following recommended: [5]

ORDER

Respondent, Crafts Cabinet, a Division of Pozzi/Hill, Inc., Chatsworth, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Changing the health insurance provider and health benefits of its employees without first giving notice to and bargaining with their collective bargaining representative, Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America.

b. Making unilateral changes in wages and other terms and conditions of employment of employees in the bargaining unit, without consulting and negotiating with Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by § 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[5] If no exceptions are filed as provided by § 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in § 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

a. Upon request, bargain in good faith with Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America concerning the health insurance plan covering its bargaining unit employees and in the event an agreement is reached, reduce it to writing and sign it.

b. Upon request by Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America, rescind the health plan it imposed upon its bargaining unit employees on August 1, 2003.

c. Within 14 days after service by the Region post at its business in Chatsworth, California, copies of the attached notice marked "Appendix." [6] Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 1, 2003.

d. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps Respondent has taken to comply.

_____

James M. Kennedy
Administrative Law Judge

Dated: September 2, 2004

[6] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

"Appendix"

Notice to Employees
Posted By Order of the
National Labor Relations Board

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- ♦ Form, join or assist a union
- ♦ Choose representatives to bargain with us on your behalf
- ♦ Act together with other employees for your benefit and protection
- ♦ Choose not to engage in any of these protected activities.

WE WILL NOT make unilateral changes in the health plan or in other terms or conditions of employment in the bargaining unit of our employees who are represented by **Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America** without prior notice to or bargaining with that Union as your exclusive collective bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you if you choose to exercise your rights as guaranteed by federal law.

WE WILL, upon its request, bargain in good faith with **Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America** concerning the health insurance plan covering bargaining unit employees and in the event an agreement is reached, reduce it to writing and sign it.

WE WILL, upon a request by **Cabinet Makers, Millmen and Industrial Carpenters, Local 721, affiliated with the United Brotherhood of Carpenters and Joiners of America**, rescind the health plan we imposed upon bargaining unit employees on August 1, 2003.

CRAFTS CABINET,
A DIVISION OF POZZI/HILL, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11150 West Olympic Boulevard, Suite 700, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7123.